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No. 96-1769

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

OHIO ADULT PAROLE AUTHORITY, et al.
Petitioners,

v.

EUGENE WOODARD,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONERS

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CAPITAL CASE
VALIDITY OF CLEMENCY PROCEDURES

QUESTIONS PRESENTED

I.

WHETHER STATE CLEMENCY PROCEDURES MAY BE REVIEWED UNDER THE DUE PROCESS LIMITATIONS ON A STATE'S OVERALL SCHEME OF ADJUDICATION OF CRIMES AND PUNISHMENT ESTABLISHED BY *EVITTS V. LUCEY*, 469 U.S. 387 (1985), OR WHETHER *CONNECTICUT BOARD OF PARDONS V. DUMSCHAT*, 452 U.S. 458 (1981) CONTAINS THE SOLE DUE PROCESS LIMITATIONS ON THOSE PROCEDURES.

II.

WHETHER INMATE INTERVIEWS, HELD VOLUNTARILY AT THE REQUEST OF THE INMATE AS PART OF A STATE CLEMENCY PROCEDURE, IMPOSE AN UNCONSTITUTIONAL CONDITION ON THE INMATE'S FIFTH AND FOURTEENTH AMENDMENT PRIVILEGE AGAINST SELF INCRIMINATION.

LIST OF PARTIES

Petitioners are the Ohio Adult Parole Authority; Jill Goldhart, Chief of the Adult Parole Authority; Margarette Ghee, Chairwoman of the Ohio Adult Parole Board; Walter Echols; Raymond E. Capots; William E. Hudson; Robert E. Smith; Richard Gooch; Gloria Andrews; Jay R. Denton; and Constance M. Upper.

Respondent is Eugene Woodard.

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On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals is reported at 107 F.3d 1178. Petition Appendix ("Pet. App. ___") 1a. The opinion of the district court is unreported. *Id.* at 41a. The magistrate judge's report and recommendation is unreported. *Id.* at 43a.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1997. *Id.* at 1a. The petition for writ of certiorari was filed on May 5, 1997, and was granted on June 27, 1997. 117 S. Ct. 2507. Jurisdiction of this Court rests on 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional provisions, U.S. Const. Amends. V and XIV, Ohio Const. Art. III, Section 11, and the relevant statutory and administrative provisions, O.R.C. 2967.07, Ohio Death Penalty Clemency Procedure, are reproduced in the appendix to this brief.

STATEMENT

This case stems from a challenge to the Ohio Governor's clemency power under the due process clause of the Fourteenth Amendment and the self-incrimination clause of the Fifth and Fourteenth Amendments. The procedure at issue commences a clemency investigation, and the optional inmate interview that goes with it, whenever inmates fail to obtain a stay of execution more than 45 days before their execution date. In reviewing this practice, it is important briefly to place the procedure in the context of clemency law in general and Ohio's clemency law in particular.

A. Clemency Law.

Clemency is not a recent innovation. The power to extend mercy to those convicted of a criminal offense has been a feature of criminal law for as long as western civilization has existed. The potential for clemency existed under Greek law, *See* United States Dept. of Justice, 3 Attorney General's Survey of Release Procedures 8-11 (1939), Roman law, *see id.* at 11-13, as well as English common law, *see Herrera v. Collins*, 506 U.S. 390, 412 (1993). And it has existed in this country since the founding under federal law, U.S. Const. Art. II, §2, and under the laws of all American States, *see* United States Dept. of Justice, 3 Attorney General's Survey of Release Procedures 89-90 (1939).

The clemency power has long been an executive prerogative. In England, the power was a royal prerogative tracing back to the 700's. *See United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833) ("this power has been exercised from time immemorial by the executive of that nation whose language is our language"); *Herrera*, 506 U.S. at 412. In this country, the power likewise was placed in the executive branch at the federal and State level. The President "shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." Art. II, §2. The States followed suit in crafting their own constitutions, placing the clemency power in the Governor or in separate clemency boards. *See* United States Dept. of Justice, 3 Attorney General's Survey of Release Procedures 89-90 (1939); Appendix ("A- __") 8-10.

The authority to grant clemency covers several forms of leniency. It includes the power to grant reprieves, which temporarily postpone the execution of a sentence so that the inmate may seek a reduction in punishment. It includes the power to commute sentences from a higher punishment to a lesser one. And it includes the power to pardon a criminal offense altogether by permanently canceling a sentence. *See generally Biddle v. Perovich*, 274 U.S. 480, 486-87 (1927); Nat'l Governor's Ass'n Center for Policy Research, Guide to Executive Clemency Among the American States 4-5 (1988).

One of the hallmarks of the clemency power, whether at English common law or in this country today, has been the discretion the executive has in exercising it. At common law, it was said that "the king may extend his mercy on what terms he pleases, and consequently may annex to his pardon any condition that he thinks fit." *Schick v. Reed*, 419 U.S. 256, 261 (1974) (citing 2 W. Hawkins, Pleas of the Crown 557 (6th ed. 1787)). In describing the President's clemency power, Alexander Hamilton wrote that "[h]umanity and good

policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed." The Federalist Papers, No. 74 (Cooke ed. 1961) 500-01. Similar discretion exists at the State level. *See* A-8-10.

B. Ohio Clemency Law.

The Ohio Constitution places the power to grant clemency in the executive branch. It gives the Governor power to grant pardons, reprieves and commutations "upon such conditions as he may think proper," except in cases of treason and impeachment. Art. III, §11; A-1. While the Ohio legislature may establish procedural rules regarding clemency applications, it may not curtail the Governor's ultimate decisionmaking authority over whether to grant clemency. *See* 1 Report of the Debates and Proceedings of the Convention for the revision of the Constitution of the State of Ohio 1850-1851 (1851) 306-307; *State v. Morris*, 378 N.E.2d 708, 714 (Ohio 1978). Nor has the Governor's discretion in this area ever been exposed to judicial oversight under Ohio law. *See State ex rel. Whiteman v. Chase*, 5 Ohio State 528, 535 (1856); *State ex rel. Maurer v. Sheward*, 644 N.E.2d 369, 373 (Ohio 1994).

Consistent with its authority to regulate the procedure for seeking clemency, the Ohio General Assembly has delegated several information-gathering responsibilities to the Ohio adult parole board, an agency within the Ohio Department of Rehabilitation and Corrections. O. R.C. §5149.02. All clemency applicants must file their requests in writing with the parole board. O.R.C. §2967.07; A-2. Upon the filing of an application or otherwise at the direction of the Governor, the board must then conduct a "thorough investigation" of each clemency applicant. *Id.* After completing its investigation, the board must file a report with

the Governor explaining its recommendation for granting or denying the application. *Id.* None of the legislature's clemency procedures, however, places any limit on the Governor's ultimate discretion to deny a clemency application.

C. Ohio's 1994 Modification To Its Clemency Procedure.

In 1994, a death row inmate failed to obtain a stay of execution until just days before his scheduled execution date. *See Collins v. Byrd*, 510 U.S. 1185 (1994). Because the inmate was a first federal habeas petitioner and because clemency review traditionally did not start before that time, the Ohio Governor faced the prospect of receiving an emergency clemency request from an inmate about whom he had little information. The eleventh-hour nature of the proceedings prompted the Governor to modify the review process. J.A. 8.

Under the new procedure, clemency review begins immediately after the inmates complete their direct review and the Ohio Supreme Court sets an execution date. *See* Ohio Death Penalty Clemency Procedure, VI(B)(1) (attached to appendix). At that point, the parole board begins collecting information about the prisoner's offense, prior record and background. *Id.* at VI(B)(2). In the event the inmate fails to stay the execution date more than 45 days beforehand, the board schedules a clemency review hearing that must be completed 21 days prior to the scheduled execution date. *Id.* at VI(B)(3) Once such a hearing has been scheduled, Ohio requires the clemency review to be completed and a recommendation to be made even though a court later stays the execution. *Id.* at VI(B)(5).

The notice of this procedure explains to the inmates that they may obtain a clemency interview without counsel if they request it in writing. *See Id.* at VI (C)(2). If a request is made, one or more parole board members interviews the inmate before the board conducts a hearing on the application. *Id.* at VI (C)(1) & (E)(1). After the hearing the board makes a clemency recommendation, which it communicates to the Governor's office. *Id.* at VI (E)(2) & (3). In the event new information becomes available after the parole board's initial recommendation, the board may supply it to the Governor, the board may in its discretion hold another hearing, or the board may alter its initial recommendation. *Id.* at VI (G).

D. The Underlying Proceedings.

Ohio's new clemency procedure became relevant to respondent, Eugene Woodard, due to a series of crimes he committed on the evening of June 20, 1990. That night he and three other men stole a car and intentionally drove it into another vehicle in order to rob the occupant. After the collision, Mr. Woodard approached the car and shot Mani Akram, a 19 year old college student, in the chest with a handgun. *State v. Woodard*, 623 N.E.2d 75, 76 (Ohio 1993). Mr. Akram was dumped from the car and left for dead (he later died from the wound), after which Mr. Woodard and his cohorts stripped and torched the vehicle. In later arguing over who should get the stolen goods, Mr. Woodard insisted "I should get the radio. I'm the one that shot the guy." *Id.* at 76.

On the basis of this and other evidence, an Ohio jury found Mr. Woodard guilty of several crimes, including aggravated murder committed during the commission of a felony. The jury recommended the death penalty, and the trial court accepted its recommendation. The state court of

appeals and the Ohio Supreme Court affirmed, and this Court denied certiorari. *See State v. Woodard*, 1992 WL 84888 (Ohio App. 8th Dist. Apr. 23, 1992); *State v. Woodard*, 623 N.E.2d 75 (Ohio 1993); *Woodard v. Ohio*, 512 U.S. 1246 (1994).

On July 18, 1994, after this Court denied Mr. Woodard's certiorari petition and in accordance with its customary procedures, the Ohio Supreme Court set Mr. Woodard's execution date for October 7, 1994. Mr. Woodard waited until August 16, 1994 to seek a stay of execution, which the Ohio Supreme Court granted on August 24, 1994. Because Mr. Woodard did not obtain a stay more than 45 days before his execution date, his clemency investigation commenced.

On September 6, 1994, the parole board notified counsel for Mr. Woodard about the clemency process and informed him that he could obtain a clemency interview if he wished on September 9, 1994. J.A. 4. The board also notified Mr. Woodard that his clemency hearing would be scheduled for September 16, 1994, twenty one days before his scheduled execution date. J.A. 4.

On September 14, 1994, Mr. Woodard filed this complaint. J.A. 2. He alleged that the new clemency procedure denied him due process, equal protection, as well as the right to remain silent, to be represented by counsel, and to be free of cruel and unusual punishment. On September 16, 1994, the parties entered into a consent decree postponing the clemency review and agreeing that it would not be rescheduled during the pendency of this suit without 30 days notice to the district court and counsel. J.A. 21. Mr. Woodard was never interviewed. The State filed an answer and then a motion for judgment on the pleadings. J.A. 27. On June 20, 1995, the magistrate judge issued a report and

recommendation granting the State judgment on the pleadings. Pet. App. 43a. The district court agreed with the report and granted the State's motion. *Id.* at 41a.

The Sixth Circuit reversed. Pet. App. 1a. It first acknowledged that Mr. Woodard could not establish a protected life or liberty interest in the clemency procedure itself, relying on *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458 (1981). Pet. App. 4a. But the court then held that clemency played a part in Ohio's overall scheme of prosecution and punishment, and concluded that the clemency procedure therefore had to be reviewed under a separate "strand" of due process recognized in *Evitts v. Lucey*, 469 U.S. 387 (1985) (due process guarantees criminal defendant the right to effective counsel on first appeal of right). Pet. App. 12a. Next, the court found that the uncounseled clemency interview seemed to place an unconstitutional condition on Mr. Woodard's Fifth and Fourteenth Amendment privilege against self-incrimination. *Id.* at 19a. The court denied all other claims as a matter of law, and remanded the case to the district court to conduct a due process review of Ohio's clemency procedure and to determine if an unconstitutional condition existed under the court of appeals' analysis.

Judge Nelson dissented. He found the due process claim indistinguishable from *Dumschat* and disagreed that *Evitts* placed separate due process limitations on Ohio's clemency procedure. Pet. App. 35a-37a. He also thought that the challenged regulation did not abridge the privilege against self-incrimination because inmates who request a clemency interview remain free to say as much or as little as they wish. *Id.* at 38a-39a.

SUMMARY OF ARGUMENT

I. Ohio's executive clemency procedure does not offend due process. Because "process is not an end in itself," *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983), the due process clause protects only those cognizable life, liberty or property interests established by federal or State law. In the case of individuals who have been lawfully convicted of a crime and therefore "constitutionally deprived" of their normal life or liberty interests, *Meachum v. Fano*, 427 U.S. 215, 224 (1976), due process safeguards just two interests. It limits the State's authority to infringe a freestanding federal right, such as an inmate's right not to be subjected to greater punishment than the State normally imposes for the crime. And it limits the State's authority to promise a substantial freedom to the inmate under State law, then arbitrarily take it away in a manner that imposes an "atypical and significant hardship on the inmate" in relation to the normal vicissitudes of prison life. *Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293, 2300 (1995); *see also Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979).

The Court has once before applied this two-step framework in rejecting the due process claim of a clemency applicant. In *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458 (1981), the claimant asserted that the board of pardons should have provided a written explanation for denying his clemency application because it granted three-fourths of all similar applications. In rejecting the claim, the Court first held that "an inmate has 'no constitutional or inherent right' to commutation of his sentence," because "the conviction, with all its procedural safeguards, has extinguished" any liberty interest in being released. *Id.* at 464 (quoting *Greenholtz*, 442 U.S. at 7). It then held that Connecticut had not created a liberty interest through its own rules or its pattern of commuting life sentences, because in

the end the board still retained discretion over whether to grant clemency. *Id.* at 466-467.

For like reasons, Ohio can weather this due process claim. As in *Dumschat*, Mr. Woodard cannot establish a freestanding federal right to clemency because no such right exists. And as in *Dumschat*, the State has not stripped the Governor of discretion to deny clemency applications for any reason or no reason at all.

Nor does *Evitts v. Lucey*, 469 U.S. 387 (1985), alter this analysis. In holding that a State's first appeal of right constitutes "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant," *Evitts* concluded that the right to counsel on appeal includes the right to effective counsel. *Id.* at 393 (quotation omitted). But just because an appeal of right is part of the "system for finally adjudicating the guilt or innocence of a defendant" does not mean that a clemency procedure is as well. State law treats the two procedures quite differently. One procedure comes to defendants as a matter of right; the other comes to them as a matter of grace. One is part and parcel of the judicial process; the other stands apart from the judicial process. One turns on the court's view of the defendant's guilt or innocence; the other exists in spite of the court's view of the defendant's guilt or innocence.

II. Equally unavailing is Mr. Woodard's Fifth Amendment claim. The privilege against self-incrimination does not prevent Ohio from offering capital inmates clemency interviews without counsel and without immunity for what they might say. On one side of the ledger, *Simmons v. United States*, 390 U.S. 377, 394 (1968), prohibits government from forcing a defendant to surrender "one constitutional right," *e.g.*, the privilege against self-incrimination, "in order to assert another," *e.g.*, the privilege

to suppress the fruits of an unreasonable search. On the other side of the ledger, States may allow individuals to waive constitutional rights in order to accept other government benefits as long as they do not compel individuals to trade one constitutional right for another. *See, e.g., Corbitt v. New Jersey*, 439 U.S. 212, 219 (1978) (State may encourage defendant to take guilty plea even though it requires waiver of right to jury trial); *Baxter v. Palmigiano*, 425 U.S. 308 (1975) (State may force inmates to choose between testifying at disciplinary hearing or remaining silent and having an adverse inference drawn against them); *McGautha v. California*, 402 U.S. 183 (1971) (State may prevent defendant from exercising right to silence in liability phase of the trial and then testifying during the punishment phase of the trial); *Wyman v. Jones*, 400 U.S. 309 (1971) (government may condition aid on the recipient's submission to warrantless searches).

The Ohio procedure stands on the permissible side of this line. In offering capital inmates a voluntary interview without counsel, the Governor has not forced them to sacrifice one constitutional right to assert another. The right to counsel simply does not extend to a clemency proceeding. *See Ross v. Moffitt*, 417 U.S. 600 (1974). There is no constitutional right to clemency. And by making the interview voluntary, inmates are entitled to speak as little or as much they wish. No compelled self-incrimination of any kind occurs on this record.

That Ohio commences its clemency review procedure whenever inmates fail to obtain a stay more than 45 days before the execution date does not change things, even for inmates who have not completed collateral review. Any problem created by simultaneous review of clemency and post-conviction applications may be cured by promptly filing a stay application once direct review has been completed.

But even when that does not occur, inmates may always choose not to be interviewed at that point in time and exercise their right to seek an interview after completing collateral review. At all events, the Constitution does not grant defendants the unadulterated right to speak freely in one setting and then insist on silence in the other, whether the two settings are clemency and collateral review or the guilt and punishment phases of a criminal trial. *See McGautha v. California*, 402 U.S. 183 (1971).

ARGUMENT

I. OHIO'S EXECUTIVE CLEMENCY PROCEDURE DOES NOT OFFEND DUE PROCESS.

Mr. Woodard complains that Ohio's executive clemency procedure contains a series of due process shortcomings: It does not allow him or his counsel to attend the parole board's clemency hearing and present evidence on his behalf; it gives insufficient notice of an inmate's clemency interview; it permits a clemency investigation to commence before all State and federal post-conviction proceedings have been completed; and it prohibits the appearance of counsel at the clemency interview. J.A. 42-43. Mr. Woodard is mistaken in each respect, as was the Sixth Circuit in failing to reject this claim as a matter of law.

A. Due Process Does Not Restrict State Procedures For Its Own Sake, But Only To Safeguard Cognizable Life, Liberty Or Property Interests.

In demanding that no State "deprive any person of life, liberty, or property without due process of law," the Fourteenth Amendment does not restrict all procedural facets of State government. Because "[p]rocess is not an end in itself," *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983), the clause safeguards only those cognizable "life, liberty, or property" interests established by federal or State law. *See Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 463 (1981). Short of such a federal or State interest to which the individual has a "legitimate claim of entitlement," *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 7 (1979) (quotation omitted), the "expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause." *Olim*, 461 U.S. at 250 n.12.

In ascertaining whether a protectible life or liberty interest exists under federal or State law, the Court has long distinguished between those who have obeyed the law and those who have not. "[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty" and therefore has a different relationship to the State from that of the law-abiding citizen. *Meachum*, 427 U.S. at 224. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston*, 334 U.S. 266, 285 (1948). *See also Olim*, 461 U.S. at 245.

The Court thus has recognized just two types of inmate interests that due process guards. The first arises under federal law, and asks whether the State has infringed any freestanding federal right in executing a sentence. For example, all inmates have a federal interest in not receiving a substantially different punishment from the one the State normally imposes for the crime committed. *See Sandin*, 515 U.S. 472, 115 S.Ct. 2293, 2297 n.4 (1995); *Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (liberty interest in refusing the involuntary administration of psychotropic drugs). The second interest arises under State law. If the States promise inmates a substantial liberty benefit, they may not arbitrarily take it away in a manner that imposes an "atypical and significant hardship on the inmate" in relation to the customary vicissitudes of prison life. *Sandin*, 115 S.Ct. at 2300. Because the "Due Process Clause standing alone confers no liberty interest in freedom from state action taken within the sentence imposed," the issue here is whether the State of its own volition has chosen to create "an interest of real substance." *Id.* at 2297 n.4 (quotation omitted).

B. Due Process Does Not Restrict Discretionary State Clemency Procedures.

Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981), applied this framework in the precise context of an inmate who claimed the State's clemency procedure violated due process. At issue was the inmate's contention that the Connecticut board of pardons should have provided an explanation for denying his application to commute a life sentence in view of the Board's record of granting a high percentage of these applications.

The Court first held that "an inmate has 'no constitutional or inherent right' to commutation of his

sentence." *Id.* at 464 (quoting *Greenholtz*, 442 U.S. at 7). Any independent federal interest in freedom no longer exists, the Court emphasized, after a lawful conviction.

> The natural desire of an individual to be released is indistinguishable from the initial resistance to being confined. But the conviction, with all its procedural safeguards, has extinguished that liberty right: [Given] a valid conviction, the criminal defendant has been constitutionally deprived of his liberty.

Id. at 464 (quoting *Greenholtz*, 442 U.S. at 7).

The Court next rejected the argument that Connecticut had created a liberty interest in clemency through its own rules and practices. While recognizing that "[a] constitutional challenge concerning executive clemency, if any, must be grounded on statutes or other rules defining the obligations of the authority charged with exercising clemency," the Court found that Connecticut had not created any such obligation. *Id.* at 465. The decisionmaker retained unfettered discretion over clemency requests, *id.* at 466-467, and thus could "deny the requested relief for any constitutionally permissible reason or for no reason at all," *id.* at 467 (Brennan, J., concurring). Neither the State's clemency procedures nor the board's track record of commuting three-fourths of all life sentences altered this bedrock feature of State clemency law. *Id.* at 466-467. In the end, the Court reasoned, a liberty interest cannot spring from a "unilateral hope" in obtaining clemency, *id.* at 465, which is all that Mr. Dumschat had in view of the uncabined discretion that the board retained over his clemency request.

In the course of its analysis, the Court observed that clemency decisions have "not traditionally been the business of the courts" and "are rarely, if ever, appropriate subjects for

judicial review," whether under the due process or any other clause. *Id.* at 464 (citing *Meachum v. Fano*, 427 U.S. 215, 225 (1976)) (footnote omitted). *See also Jago v. Van Curen*, 454 U.S. 14 (1981) (per curiam). The observation is grounded in history: To our knowledge, not a single decision from this Court, or for that matter any final decision from the lower federal courts, has ever restrained a State's clemency procedures under the United States Constitution.

C. Ohio's Clemency Procedure Meets These Modest Requirements.

Ohio's clemency procedure should not be the first State law to receive such treatment. Ohio has comported in all respects with the Court's general due process instructions and with the specific teachings of *Dumschat*.

1. No Life Or Liberty Interest Exists Because The Governor Retains Complete Discretion To Deny Clemency Applications.

Neither the due process clause nor any other provision of the United States Constitution by itself creates a federal right to clemency. What the Court said in *Dumschat* remains true today: "[a]n inmate has no constitutional or inherent right to commutation of his sentence." 452 U.S. at 464 (quotation omitted). Aside from reposing power in the President to grant pardons and reprieves from federal sentences, U.S. Const. Art. II, §2, cl. 1, the federal

Constitution falls short of speaking to, to say nothing of establishing, a federal right to clemency.

Nor has Ohio created a liberty interest in clemency under State law. In Ohio, as in Connecticut under *Dumschat*, the executive branch retains broad discretion over the clemency power. The Ohio Constitution permits the clemency power to be exercised "upon such conditions as the Governor may think proper." Ohio Const., Art. III, §11. More specifically, it vests unfettered discretion in the Governor to *deny* clemency applications, while limiting the Governor's authority to *grant* clemency in cases of treason and impeachment. *See State ex rel Maurer v. Sheward*, 644 N.E.2d 369, 373-74 (Ohio 1994). The Ohio courts have been steadfast in respecting the Governor's discretion in this area, most recently rejecting a challenge to the Governor's approval of 11 clemency applications in 1990, seven of which commuted capital sentences to life sentences. *Id.*

The Ohio legislature has followed suit. It has not prescribed substantive limitations on the Governor's clemency power, and indeed lacks authority to do so. *Id.*; *State v. Morris*, 378 N.E.2d 708 (Ohio 1978); *Knapp v. Thomas*, 39 Ohio St. 377 (1883).

Nor has the Governor's office placed any restraints on its power through the passage of discretion-stripping regulations. The challenged procedure merely sets up a sensible method for preparing a clemency recommendation when an execution date is imminent and the inmate has not yet filed an application. No mandatory language of any sort impedes the Governor's discretion.

In the last analysis, Ohio's clemency law, just like the clemency law in *Dumschat*, vests the Governor with unbridled authority. And, as in *Dumschat*, this discretion

precludes the creation of a life or liberty interest that would allow Mr. Woodard to obtain the procedural protections of the due process clause. Because the "process" protected by the clause "is not an end in itself," *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983), and because no liberty interest exists in Ohio's clemency procedure (as the Sixth Circuit itself acknowledged, Pet. App. 11a), this claim fails as a matter of law. *See also Jago v. Van Curen*, 454 U.S. 14, 21 (1981) ("the [Sixth Circuit] Court of Appeals' own concession that Ohio law creates no protected 'liberty' interests require reversal of the holding of the Court of Appeals that respondent was entitled to a hearing prior to denial of his parole in June").

2. *Evitts v. Lucey* Does Not Alter This Analysis.

In reviewing Mr. Woodard's due process claim, the Sixth Circuit did not disagree with the above analysis. Just like the district court, it adhered to this approach from start to finish, acknowledging that it "was analytically correct." Pet. App. 11a; s*ee generally id.* at 4a to 11a. Instead of affirming the district court's decision at that point, however, the appellate court proceeded to articulate and then apply another "strand" of due process analysis. *Id.* at 11a. In its view, *Evitts v. Lucey*, 469 U.S. 387, 393 (1985), requires State and federal proceedings to meet a second strand of due process protection if they relate to "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant." *See* Pet. App. 12a (quotation omitted). Because the court viewed clemency as one such proceeding, *id.* at 13a, it held that *Evitts* must be applied "in equal measure to the clemency procedures," *id.* at 14a. The court was wrong.

First, the lower court's attempt to respect *Evitts* necessarily slights *Dumschat.* Either the States have broad authority to enact clemency procedures under the due process clause or they do not. The States' wide discretion in establishing a clemency procedure under *Dumschat* cannot tenably co-exist with a separate set of limitations on the same procedure under *Evitts*. The extension of *Evitts* to the clemency setting invariably contracts the discretion given to the States under *Dumschat,* as the Sixth Circuit's decision in this case well illustrates: Ohio is entitled to judgment as a matter of law under *Dumschat* but must undergo further scrutiny under *Evitts*. Because just one due process clause governs State action, the States should be required to follow just one set of procedural rules in trying to obey the clause.

Second, there is no need to create a fork in the federal review of clemency procedures because *Evitts* and *Dumschat*, follow one rule, not two, and in the end are entirely compatible with each other. Each case, to begin with, arose at a very different stage in the criminal process. *Dumschat* arose long after the defendant had completed direct review of his conviction and sentence, while *Evitts* arose on direct review of a criminal conviction. At issue in *Evitts* was whether due process guarantees a criminal defendant effective assistance of counsel on his first appeal as of right. Building on the criminal defendant's constitutional right to counsel on direct appeal, *see Douglas v. California*, 372 U.S. 353 (1963), *Evitts* concluded that the right to counsel necessarily includes the right to effective counsel. "[I]f a State has created appellate courts as 'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant,'" the Court reasoned, "the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." 469 U.S. at 393 (quoting *Griffin v. Illinois*, 351 U.S. 12, 18 (1956)).

Yet this conclusion, together with the reasoning underlying it, by no means diverts from the due process framework applied in *Dumschat*. Just because a direct appeal of right constitutes a part of the "system for finally adjudicating the guilt or innocence of a defendant" does not mean that a clemency proceeding does as well. Clemency proceedings and direct appeals of right fall on different sides of a constitutional line that existed long before *Dumschat* and *Evitts*. It is precisely the line that explains why the Fourteenth Amendment grants criminal defendants a right to counsel at trial, *see Gideon v. Wainwright*, 372 U.S. 335 (1963), and a right to counsel on a direct appeal as of right, *see Douglas v. California*, 372 U.S. 353 (1963), but denies such a right for discretionary appeals, *see Ross v. Moffitt*, 417 U.S. 600 (1974), as well as for disciplinary proceedings, *see Wolff v. McDonnell*, 418 U.S. 539, 570 (1974). And it is precisely the line that *Dumschat* recognized in stating that the liberty interests of those whose guilt and innocence has been determined rests on a different footing from those whose guilt and innocence has not been determined. 452 U.S. at 464.

The lower court's *Evitts/Dumschat* dichotomy is false in another respect. It may be true, as the court of appeals reasoned, that the States have no obligation to grant direct appeals of right to criminal defendants. *See Evitts,* 469 U.S. at 393 (citing *McKane v. Durston*, 153 U.S. 684 (1894)); Pet. App. 12a-13a. And it may be true that the States likewise have no obligation to permit clemency applications. *See Dumschat, supra;* Pet. App. 12a-13a. But it does not follow that Ohio's decision to offer both procedures to convicted criminals creates a due process life or liberty interest in each. *See* Pet. App. 13a.

Beyond the States' initial discretion to establish an appeal of right and an opportunity to seek clemency, the two procedures have little in common. One is part and parcel of

the judicial process; the other stands apart from the judicial process. One turns on the courts' view of the defendant's guilt or innocence; the other exists in spite of the courts' view of the defendant's guilt or innocence. *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 161 (1833) ("the judge sees only with judicial eyes, and knows nothing respecting any particular case, of which he is not informed judicially"). And one procedure comes to defendants as a matter of right; the other comes to them as a matter of grace.

Thus, while the executive retains unfettered discretion to deny clemency applications, the same is not true with respect to direct criminal appeals. In Ohio, as in other States, a defendant who establishes that no evidence supports the conviction is guaranteed a reversal, *State v. Jenks*, 574 N.E.2d 492 (Ohio 1991), as is the defendant who establishes that the trial was improperly conducted, *State v. Sage*, 510 N.E.2d 343, 351 (Ohio 1987). The State has placed no such limits on its exercise of the clemency power, and accordingly has not created a liberty interest warranting procedural protection. The discretionary nature of clemency, in short, is not a legitimate counterpart to a first appeal of right, and the liberty interest created by one simply does not apply to the other.

Third, besides elevating *Evitts* at the expense of *Dumschat* and besides finding tension in the case law when there is symmetry, the lower court's analysis sets in motion a theory that could well jeopardize other settled features of due process law. It takes little vision to anticipate how the adoption of this approach could transform *Evitts* into an eye-straining grant of judicial authority to review all manner of State practices. It is unclear, for example, why the lower court's interpretation does not apply with equal force to State-court discretionary appeals or to State and federal post-conviction proceedings. If the most discretionary State procedure known to the criminal law (clemency) warrants due

process review, surely less discretionary features of the criminal law deserve it as well. But that conclusion not only makes *Dumschat* a dead letter, it also spells the demise of *Ross v. Moffitt*, 417 U.S. 600 (1974) (due process does not require appointment of counsel for discretionary appeal from criminal conviction), of *Pennsylvania v. Finley*, 481 U.S. 551 (1987) (due process does not require appointment of counsel for non-capital inmates seeking State post-conviction relief), and of *Murray v. Giarratano*, 492 U.S. 1 (1989) (due process does not require appointment of counsel for capital inmates seeking State post-conviction relief).

The lower court's analysis, in other words, not only finds tension between *Dumschat* and *Evitts* when there is none; but the court's alleged solution also will beget still more tension in the case law, which will beget still more dilution of the States' traditional discretion in these areas. The Court should not allow this novel approach to take root.

D. Subjecting Clemency Proceedings To Judicial Review Will Impede, Not Advance, Requests For Mercy.

In addition to breaking new ground in subjecting clemency to due process review, the lower court's approach ultimately disserves the basic point of permitting clemency -- to ensure that the executive branch has an opportunity to correct miscarriages of justice and impart mercy. Clemency has long been an executive function, one established to "prevent[] miscarriages of justice where judicial process has been exhausted," *Herrera v. Collins*, 506 U.S. 390, 412 (1993), not to produce another layer of judicial review, *see Ex Parte Grossman*, 267 U.S. 87, 120-121 (1925); *Schick v. Reed*, 419 U.S. 256, 267 (1974). Clemency thus allows the

State to impart mercy not because it is due but quite often in spite of whether it is due.

Under these circumstances, the real value of continuing to honor the judiciary's restraint in this area stems from the two-way nature of clemency review. If criminal defendants may seek judicial review of State clemency procedures and decisions, will not victims and their families have the same right when they disagree with the executive's decision to grant clemency? Nor is this an abstract point, at least in Ohio. In 1991, in his last week of office, then-Governor Richard Celeste commuted the sentences of eight capital inmates and 68 other prisoners. In spite of the firestorm of protest that emerged over these wholesale commutations, neither the victims' families nor anyone else was ever able to undo these acts of mercy. *See State ex rel. Maurer v. Sheward*, 644 N.E.2d 369 (Ohio 1994). The reason was straightforward: The Ohio Governor's authority to deny or grant these clemency applications was not reviewable. *Id.*; *State v. Morris*, 378 N.E.2d 708 (Ohio 1978); *Knapp v. Thomas*, 39 Ohio St. 377 (1883).

As the Ohio experience reveals, lack of judicial oversight over executive clemency decisions preserves a separation-of-powers principle that is as apt to be a benefit as a hazard to capital inmates. A similar principle operates at the federal level, as the Court has recognized in restricting congressional interference with the President's clemency power, *see Ex Parte Garland*, 71 U.S. 333 (1866) ("[t]he benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions"), and in historically refusing itself to second-guess the President's clemency prerogative, *cf. Ex Parte Grossman*, 267 U.S. 87, 119 (1925); *United States v. Klein*, 80 U.S. 128, 147 (1872).

Nor is there any basis in logic or experience for respecting structural requirements at the federal level but disregarding them when it comes to the vertical separation of powers between the federal government and the States. In view of the "dual sovereignty" of the State and national governments, *Printz v. United States*, ___ U.S. ___, 65 U.S.L.W. 4731, 4737-4738 (1997), the State clemency procedures deserve no less independence from judicial oversight than their federal counterparts.

Breaching these lines of authority also will undermine one of the benefits of centralizing the clemency power. By making clemency as much the responsibility of the federal judiciary as the executive branch, the courts will remove Presidents and Governors from the immediacy of the vital power they exercise.

> "As the sense of responsibility is always strongest in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives, which might plead for a mitigation of the rigor of the law, and least apt to yield to considerations, which were calculated to shelter a fit object of its vengeance. The reflection, that the fate of a fellow creature depended on his sole fiat, would naturally inspire scrupulousness and caution."

Schick v. Reed, 419 U.S. 256, 263 (1974) (quoting Federalist No. 74); *see also* Brown, *The Quality of Mercy*, 40 U.C.L.A. L. Rev. 327, 335 (1992); Note, *Reviving Mercy in the Structure of Capital Punishment*, 99 Yale L.J. 389, 391 (1989) ("mercy must stand outside and above justice, contemplating death sentences from a perspective external to the norms of due process").

In the final analysis, notions of redemption, mercy and grace do not lend themselves to procedural review because they exist in spite of, not because of, whether they are due. The lower court's conclusion to the contrary is not only wrong as a matter of law, but in the end threatens to impede rather than advance every inmate's last hope -- the sovereign's forgiveness. The decision should be reversed.

II. A VOLUNTARY INTERVIEW, REQUESTED BY THE INMATE AS PART OF A STATE'S CLEMENCY PROCEDURE, DOES NOT IMPOSE AN UNCONSTITUTIONAL CONDITION ON THE INMATE'S PRIVILEGE AGAINST SELF-INCRIMINATION.

No less flawed is Mr. Woodard's second claim -- that Ohio placed an unconstitutional condition on his Fifth (and Fourteenth) Amendment privilege against self-incrimination by permitting him to seek a voluntary clemency interview without counsel and by doing so without a grant of immunity for the things he might say. Because the right to counsel does not extend to clemency proceedings and because the privilege against self-incrimination does not prohibit voluntary statements, the Sixth Circuit also erred in failing to reject this claim as a matter of law.

A. States Do Not Violate The Fifth Amendment Unless They Compel Speech Or Compel Individuals To Waive The Privilege In Order To Assert Another Constitutional Right.

The doctrine of unconstitutional conditions is less of a doctrine and more of a question whether government has violated a specific guarantee of the United States Constitution. The Constitution nowhere prohibits States from placing conditions on the exercise of constitutional rights, and nowhere prohibits individuals from waiving those rights. Because "not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid," *Corbitt v. New Jersey*, 439 U.S. 212, 219 (1978), the Constitution just prohibits the States from directly violating those rights or indirectly doing so by placing improper sanctions on those who exercise them.

As made applicable to the States by the Fourteenth Amendment, the Fifth Amendment commands that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const., Am. V. The guarantee of course does not prohibit criminal defendants from speaking freely in incriminating ways, either because the truth ultimately advances their cause or because the truth for all its shortcomings may still be liberating. All the clause prohibits is "compelled" testimony, which runs the risk of being inaccurate and thus disserves the goals of a legitimate and fair penal system. *Miranda v. Arizona*, 384 U.S. 436, 457 (1969).

In several cases, the Court has explained the contours of government procedures that improperly compel

incriminating speech and those that do not. The first of these cases, *Simmons v. United States*, 390 U.S. 377 (1968), arose from a botched attempt to rob a local bank. After the arrest, the defendant tried to suppress evidence of the contents of a suitcase on Fourth Amendment grounds. In order to do so under then-existing law, the defendant had to admit ownership of the suitcase, *see Jones v. United States*, 362 U.S. 257 (1960), *over'd in part, Rakas v. Illinois*, 439 U.S. 128 (1978), *over'd in part, United States v. Salvucci*, 448 U.S. 83, 84 (1980), which understandably created a "dilemma" for the defendant in view of the government's decision to use all suppression testimony against him at trial. 390 U.S. at 391. Noting that a "defendant who wishes to establish standing must do so at the risk that the words which he utters may later be used to incriminate him," *id.* at 393, the Court found "it intolerable that one constitutional right should have to be surrendered in order to assert another." *Id.* at 394.

As later cases showed, the *Simmons* decision represented the exception, not the rule, in the area of criminal procedure. Three years later, in *Wyman v. Jones*, 400 U.S. 309 (1971), the Court rejected a claim that the government penalizes Fourth Amendment rights when it conditions acceptance of Aid to Families with Dependent Children (AFDC) on the recipient's submission to warrantless searches. Focusing on the individual's initial option to accept AFDC benefits, the Court found no coercive action by the government. The beneficiary was free to choose between foregoing benefits and preserving the privacy of her home, or accepting the benefits and consenting to the searches. *Id.* at 317-18. In contrast to the facts in *Simmons*, the government had not set up one constitutional right against another. It had merely placed a condition on a government benefit, one that it was fully entitled to impose.

Soon after *Wyman*, the Court rejected an attempt to engraft the doctrine of unconstitutional conditions onto a State criminal procedure. In *McGautha v. California*, 402 U.S. 183 (1971), the defendant challenged Ohio's single trial procedure, which then said that a defendant could exercise his right against self-incrimination only on the condition that he also surrender his right to testify on the issue of punishment. In defendant's view, the procedure improperly compelled him to choose between remaining silent on the issue of guilt at the cost of surrendering any chance to plead his cause on the issue of punishment. *Id.* at 211. The Court rejected the challenge.

Writing for the Court, Justice Harlan noted that the rules of criminal procedure, like the rest of the legal system, are replete with situations requiring "the making of difficult judgments" as to which course to follow. *Id.* at 213. Even though "a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose. The threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the right involved." *Id.* Measured against this modest standard, the Court found no such impairment through a state procedure that forced consistency -- by requiring the defendant to choose between remaining silent on both issues or testifying on both issues. *Id.* at 217.

In *Baxter v. Palmigiano*, 425 U.S. 308 (1975), the Court followed the same course. The defendant challenged a State procedure that forced inmates to choose between (1) waiving their Fifth Amendment privilege to testify at a disciplinary hearing or (2) remaining silent and having an adverse inference drawn from their silence. The Court upheld the procedure, observing that "permitting an adverse inference to be drawn from an inmate's silence at his

disciplinary proceedings is not, on its face, an invalid practice." *Id.* at 320. More recent cases are to the same effect. *See, e.g., Griffin v. Wisconsin*, 483 U.S. 868 (1987) (permitting warrantless searches of the residences of individuals on probation); *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978) (the prosecutor may present "the defendant with the unpleasant alternative of forgoing trial or facing charges on which he was plainly subject to prosecution"); *Chaffin v. Stynchcombe*, 412 U.S. 17, 31 (1973) (prosecutor may encourage guilty plea even though it requires waiver of jury trial right).

As these cases make clear, the States may offer government benefits on the condition that the recipient waive certain criminal procedure rights (*Wyman, Griffin, Hayes, Chaffin*), and they may restrict individuals who demand the right to speak freely in one setting and insist on immunity in another (*McGautha, Baxter*). Only when the government "'benefit' to be gained is that afforded by another provision of the Bill of Rights," as it was in *Simmons*, 390 U.S. at 394, does a Fifth Amendment violation occur.

B. Ohio's Clemency Procedure Does Not Violate The Fifth Amendment.

Sized up against this standard, Ohio's clemency procedure withstands scrutiny. As a preliminary matter, any suggestion that Mr. Woodard is entitled to counsel at the clemency interview is mistaken. The right to counsel by its very terms is limited to "criminal cases," *Hannah v. Larche*, 363 U.S 420, 440 n. 16 (1960), and does not extend beyond the first appeal of right, *see, e.g., Pennsylvania v. Finley*, 481 U.S. 551 (1990); *Evitts v. Lucey*, 469 U.S. 387 (1985); *Wolff v. McDonell*, 418 U.S. 539 (1974); *Ross v. Moffitt*, 417 U.S. 600 (1974). Because Mr. Woodard had no right to counsel

at the clemency interview, he cannot tenably claim that he was forced to sacrifice his right to counsel in order to participate in the clemency procedure.

Nor is this a case like *Simmons* in which the government forced the defendant to sacrifice one constitutional right in order to assert another. Because Ohio was not compelled to provide a clemency interview, it was free to set the terms on which it would be provided so long as it did not force the defendant to sacrifice another constitutional right in doing so. Here, the procedure allows Mr. Woodard to decide whether to make a statement and if so to determine how much or how little he wishes to say. A State does not abridge the right against self-incrimination when the decision to communicate is completely voluntary and the State does not force inmates who choose silence to bargain away another constitutional right. *See Simmons*, 390 U.S. at 389-94; *Murphy v. Minnesota*, 465 U.S. 420, 429 (1984) (an individual confronted with questions "ordinarily must assert the privilege rather than answer if he desires not to incriminate himself").

Mr. Woodard's contrary arguments are mistaken. He mainly appears to complain about the timing of the interview, not its existence. Since the interview in this instance arose while his State post-conviction proceeding was ongoing, he argues that what he says in the interview could be used to defeat his habeas claim or set up some other claim by the State. This is particularly unsettling, in Mr. Woodard's view, because his best chance at clemency could require him to admit his transgressions with the hope that candor would improve his odds of obtaining mercy.

The timing problem is one of his own making. So long as the defendant obtains a stay more than 45 days before the execution date, the procedure and the interview that goes

with it do not commence. Any timing concerns can be remedied by seeking a stay more promptly, particularly since Ohio guarantees capital inmates an initial six-month stay to exhaust state post-conviction remedies. *State v. Glenn*, 514 N.E.2d 869 (Ohio 1987). In this instance, for example, the Court denied Mr. Woodard's petition for certiorari on June 27, 1994. Then, on July 18, 1994, the Ohio Supreme Court set an October 7, 1994 execution date. Nonetheless, Mr Woodard waited until August 16, 1994 to ask the Ohio Supreme Court for a stay to pursue post-conviction relief, which was too late to halt the clemency investigation.

But even late filers like Mr. Woodard are not necessarily prejudiced in the end. They can always exercise their right to silence during the initial clemency investigation. Then, assuming they fail to obtain collateral relief from the State or federal courts, they can file a new clemency application and seek an interview at that point in time. *See* Ohio Death Penalty Clemency Procedure VI (G). The essential point is that the procedure "is not, on its face, an invalid practice, and there is no basis in the record for invalidating it as here applied to" Mr. Woodard. *Baxter*, 425 U.S. at 320.

At any rate, what Mr. Woodard's theory of constitutional law really demands is something he could not possibly want. The risk that the words uttered in a clemency application may be used against a defendant in a post-conviction proceeding exists for *all* clemency procedures, not just Ohio's. That is because clemency applications of capital inmates invariably overlap to some degree with post-conviction proceedings. It is the rare individual who does not pursue both routes, as opposed to just one, in trying to seek relief from an imminent execution date. If Mr. Woodard is correct, however, no State could initiate clemency proceedings until the last post-conviction proceeding had

ended, which would be too late to matter or would be too late to allow for a thorough investigation of the application. In other words, the dilemma faced by the clemency applicant who wishes to make self-incriminating statements in order to improve chances at clemency does not go away with the invalidation of Ohio's interview procedure. It would still exist for all written clemency applications, so long as all routes of post-conviction had not been used, including for example the occasional "actual innocence" claim that may surface immediately before an execution date. *See Herrera v. Collins*, 506 U.S. 390 (1993).

Much of the criminal law involves instances in which the defendant must make a difficult choice between pursuing one line of factual development or another or advancing one legal right over another. The right to testify, to use the most obvious example, cannot simultaneously be exercised with the right to remain silent -- and vice versa. Yet under the Sixth Circuit's reasoning, state and federal officials may no longer rely on this long-accepted truth. Removing the opportunity to present defendants with free (albeit difficult) choices undermines authority to allocute at sentencing for a potentially lighter sentence, to plea bargain for a potentially lighter sentence, to cast light on remaining silent at a prison disciplinary hearing, to force someone to present an alibi defense, or ultimately even to cross-examine individuals that agree to testify at trial.

The privilege against self-incrimination does not apply in these or other circumstances, and most particularly not in the context of Ohio's clemency procedure. The court of appeals' contrary decision should be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

1. The Fifth and Fourteenth Amendments to the United States Constitution provide, in pertinent part:

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

2. Article III, Section 11 of the Ohio Constitution provides:

The Governor shall have power, after conviction, to grant reprieves, commutations, and pardons for all crimes and offenses, except treason and cases of impeachment, upon such conditions as the Governor may think proper; subject, however, to such regulations, as to the manner of applying

for commutations and pardons, as may be prescribed by law. Upon conviction for treason, the Governor may suspend the execution of the sentence, and report the case to the General Assembly, at its next meeting, when the General Assembly shall either pardon, commute the sentence, direct its execution, or grant a further reprieve. The Governor shall communicate to the general assembly, at every regular session, each case of reprieve, commutation, or pardon granted, stating the name and crime of the convict, the sentence, its date, and the date of the commutation, pardon, or reprieve, with the Governor's reasons therefor.

3. Section 2967.07 of the Ohio Revised Code provides:

All applications for pardon, commutation of sentence, or reprieve shall be made in writing to the adult parole authority. Upon the filing of such application, or when directed by the governor in any case, a thorough investigation into the propriety of granting a pardon, commutation, or reprieve shall be made by the authority, which shall report in writing to the governor a brief statement of the facts in the case, together with the recommendation of the authority for or against the granting of a pardon, commutation, or reprieve, the grounds therefor and the records or minutes relating to the case.

4. The Ohio Death Penalty Clemency Procedure provides:

I. *AUTHORITY*

This policy is issued in compliance with Ohio Revised Code 5120.01 which delegates to the Director of the Department of Rehabilitation and Correction authority to manage all Divisions and Institutions of the Department and to establish such rules and regulations as he prescribes.

II. *PURPOSE*

The purpose of this policy is to establish a standard procedure for handling applications for clemency in death penalty cases and for review of death penalty cases where no application has been filed.

III. *APPLICABILITY*

This policy applies to the Ohio Parole Board and other employees of the Ohio Department of Rehabilitation and Correction, who are responsible for collecting and providing information, scheduling hearings, providing notices, etc., and to prisoners under sentence of death and the attorneys representing them.

IV. *DEFINITIONS*

None.

V. *POLICY*

It is the policy of the Ohio Department of Rehabilitation and Correction to fulfill its duties

related to the executive clemency process in a manner that is expeditious and is fair to the condemned prisoner, as well as to the family and friends of the victim and the public at large.

VI. *PROCEDURE*

A. Notification to all condemned inmates of this policy.

1. All prisoners committed to the Department of Rehabilitation and Correction with a sentence of death shall be given a copy of this policy.

B. Information gathering and scheduling of the hearing:

1. At the time the Ohio Supreme Court completes its review of a criminal case upon direct appeal, and fixes an execution date, the institution or office of the department receiving notice of such decision shall forward a copy to the Parole Board.

2. Upon receipt of said notice or upon its own initiative, the Parole Board shall request an investigation into the details of the prisoner's offense, prior record and other relevant information.

3. Forty-five days in advance of any scheduled execution date, unless that date has been stayed, the parole board chair will schedule a clemency review to be held at central office. This clemency review will be scheduled to occur approximately twenty-one days prior to the scheduled execution date.

The parole board shall send any required notices to the sentencing court, the prosecutor, and the victim's family or representative.

4. The parole board shall also have a notice delivered to the prisoner advising him that he may request to be interviewed in person by one or more parole board members or hearing officers and have the board consider any statements he may make. The parole board will send a copy of this notice to the office of the public defender or other counsel for the prisoner.

5. Once the clemency review hearing has been scheduled, it shall be completed and a recommendation made to the Governor regardless of any subsequent stay of the execution of the sentence.

C. Interview of prisoner by parole board member or hearing officer.

1. The parole board chair will cause the notice advising that the board will be considering his case for a clemency recommendation to be personally delivered to the prisoner. This notice shall advise him that if he requests it in writing, he will be interviewed by one or more parole board members or hearing officers prior to the board considering his case. The notice shall advise him that he can make the request by noting his desire for the interview on the notice and returning it to the parole board chair. The prisoner will be asked to submit to a

psychological or psychiatric evaluation as determined appropriate by the Parole Board.

2. If the prisoner requests the personal interview, the parole board chair will appoint one or more board members or hearing officers to interview the prisoner at the confining institution. Only the prisoner and the person or persons assigned by this parole board chair shall be present at the interview.

D. Attendance at the hearing:

1. The hearing will be held at central office during normal business hours.

2. If the prisoner chose to be interviewed, each of the board members and hearing officers that attended the interview shall attend the hearing to present to the board any information offered by the prisoner.

3. Attendance by others at the hearing is at the sole discretion of the parole board chair.

E. The nature of the hearing:

1. At the hearing, the Parole Board will consider all available relevant information including any application for clemency that the prisoner submitted and any statement that he gave to the board members or hearing officers that interviewed him.

2. The Parole Board shall deliberate and render a decision the day of the hearing if possible.

Once the decision is made, minutes will be signed by the Parole Board and the decision communicated to the Chief Legal Counsel for the Governor.

3. Within five (5) business days after the Parole Board's decision, the Governor's Office will receive the written report and recommendation. The Parole Board will notify the prisoner, the prisoner's counsel, the prosecutor, the victim's representative and the Office of the Attorney General of its recommendation.

4. A press release shall be prepared by the Public Information Office and made available to the media after the report and recommendation have been delivered to the Office of the Governor.

F. In the event that there is insufficient time before a scheduled execution to utilize the normal information gathering or hearing process, the normal procedure shall not apply. The Parole Board shall assemble as much information as is feasible under the circumstances. Within the discretion of the chairman of the Parole Board, a hearing may be scheduled, provided, however, that there is sufficient time to arrange for the appropriate Parole Board officials to be present and that the necessary parties either receive the legally-required notice or waive such notice. In the event that a hearing is convened, the provisions of this policy governing such hearings shall apply. In the event that no hearing is held, the chairman of the Parole Board may forward an informational report to the office of Chief Legal Counsel for the Governor.

G. In the event that the Parole Board is made aware of information or circumstances not considered in its initial determination, or upon the filing of a subsequent petition on behalf of the condemned prisoner, the Parole Board may supplement its initial decision and recommendation with such informational update as may be appropriate. At the discretion of the chairman of the Parole Board, a hearing may be convened for this purpose. If such a hearing is convened, it shall be conducted according to the procedures specified in this policy for the initial consideration. Following any updated investigation or hearing, the Parole Board may elect to notify the office of Chief Legal Counsel for the Governor of an informational update to its original decision, or make a new decision and recommendation.

H. At the time of the notice of a hearing to consider clemency under this policy, or any time subsequent, the family of the victim or a representative may be given the opportunity to waive notice of any subsequent hearings or decisions.

STATE CLEMENCY PROCEDURES.

A. States that vest clemency power in Governor.

Alaska Const. Art III §21, Alaska Stat. Ann. §33.20.070. - .080 (1996); Ariz. Const., V § V, Ariz. Rev. Stat. Ann. §31-441-446 (1996); Ark Const. Art. VI §18, Ark. Code. Ann. §16-93-204 (1995); Cal. Const. Art. V §8, Cal. Govt. Code § 4800 (1992); Col. Const. Art. IV § VII, Col. Rev. Stat. Ann. § 16-17-101 (1996); Del. Const. Art. VII §1, Del. Code Ann. tit. 11 § 4361 - 63 (1996); Fla. Const. Art. IV § 8, Fla. Stat. Ann. § 940.01 (1996); Haw. Const. Art. IV § V, Haw.

Rev. Stat. § 353-72, § 706-656 (1996); Ill. Const. Art. V § 12, Ill. Code § 5/3-3-13 (1996) ; Ind. Const. Art. V § 17, Ind. Code § 11-9-2-1 to 11-9-2-3 (1996); Iowa Const. Art. IV § 16, Iowa Code § XVI-3-914.1 (1996); Kan. Const. Art. I § 7, Kan. Stat. Ann. 37 § 22-3701 (1996); Ky. Const. § 77; La. Const. Art. IV § 5, La. Rev. Stat. Ann. 15 § 572 (1997); Me. Const. Art. V Pt. 1, Me. Rev. Stat. 307-15 § 2162 (1996); Md. Const. Art. II § 20, Md. Ann. Code Art. 41 § 513 (1996); Mass. Const. Art. VIII § 64, Mass. Gen. Laws Ann. 127 § 152 -157 (1997); Mich. Const. Art. V § 14, Mich. Stat. Ann. § 28.2313, 28.314 (1996) ; Miss. Const. Art. V § 124, Miss. Code Ann. § 47-5-115 (1997); Mo. Const. Art. IV, Mo. Rev. Stat. XIII § 217.800 (1996); Mont. Const. Art. VI § 12, Mont. Code Ann. 46-23-301 to 46-23-316 (1995); N.H. Const. Pt. 2 Art. 52, N.H. Rev. Stat. Ann. 4:21 to 25 (1996); N.J. Const. Art. III § 2, N.J. Stat. § 2A:167-4 (1996); N.M. Const. Art. V § 6, N.M. Stat. Ann. 31-21-17 (1997); N.Y. Const. Art. IV § 4, N.Y. C.L.S. Exec. § 15 (1997); N.C. Const. Art. III § 5, N.C. Gen. Stat. § 147-23 (1996); N.D. Const. Art. 5 § 6, N.D. Cent. Code § 12-55-05 (1995); Ohio. Const. Art. III § 11, Ohio. Rev. Code Ann. 2967.02 (1997) ; Ok. Const. Art. VI § 10, 57 Ok. Stat. tit. 57 § 332 (1996); Or. Const. Art. 5 § 14, Or. Rev. Stat. 144.640 (1996); Pa. Const. Art. IV § 9, Pa. Stat. Ann. 71 § 299 (1996); R.I. Const., Art. II, Section XIII, R.I. Gen. Laws §13-10-1 (1996); Tenn. Const. Art. III § 6, Tenn. Code Ann. § 40-27-101, 40-28-104 (1996); Tex. Const. Art. IV § 11, Tex. Code Crim. Proc. Ann. Art. 48.01 (1997); Vt Const. Ch 2, § 20, Vt. Stat. Ann. §809-810 (1996); Va. Const. Art. V § 12, Va. Code. Ann. § 53.1-229 (1996); Wash. Const. Art. III § 9, Wash. Rev. Code Ann. 9.94A.394; W.Va. Const. Art. VII § 11, W.Va. Code Ann. § 5-1-16 (1996); Wis. Const. Art. V § 6, Wis. Stat. § 973.013 (1995-96); Wyo. Const. Art. 4 § 5, Wyo. Stat. Ann. § 7-13-401 (1996).

B. States that vest clemency power in a board.

Conn. Const. Art. IV. § 13, Conn. Gen. Stat. § 321-18-24a, 321-18-30 (1997); Ga. Const. Art. IV § 2, Ga. Code Ann. § 42-9-20, 42-9-45 (1997); Idaho Const. Art. IV § VII, Idaho Code § 20-240 (1997); Minn Const. Art. V, § 14, Minn Stat. §638.01 (1996); Neb. Const. Art. 4 § 13, Neb. Rev. Stat. § 83-1 (1996); Nev. Const. Art. 4 § 14, Nev. Rev. Stat. § 213.005 to 213.100 (1995); S.C. Const. Art. IV § 3, S.C. Code Ann. § 24-21-910 to 24-21-1000 (1996); S.D. Const. Art. IV § 3, S.D. Codified Laws § 24-14-1 (1997); Utah Const. Art. VII, §12, Utah Code Ann. § 77-27-5 (1996).

C. States that vest clemency power in Governor and a board.

Ala. Const. Art. V, Ala Code § 15-22-27, 15-22-36, 15-22-37 (1996).

D. States in which Governor sits on clemency board.

Fla. Const. Art. IV § 8, Fla. Stat. Ann. § 940.01 (1996); Idaho Code § 20-240 (1997); Neb. Const. Art. 4 § 13, Neb. Rev. Stat. § 83-1(1996); Nev. Const. Art. 4 § 14, Nev. Rev. Stat. § 213.005 to 213.100 (1997).

E. States in which Governor may grant clemency only upon the positive recommendation of board.

Ariz. Const., V § V, Ariz. Stat. Ann. §31-441-446 (1996); Del. Const. Art. VII §1, Del. Code Ann. Tit. 11 § 4361 - 63 (1996); Fla. Const. Art. IV § 8, Fla. Stat. Ann. § 940.01 (1996); Ind. Const. Art. V § 17, Ind. Code § 11-9-2-1 to 11-9-2-3 (1996); La. Const. Art. IV § 5, La. Rev. Stat. 15 § 572 (1997); Ok. Const. Art. VI § 10, 57 Ok. Stat. § 332 (1996); Pa. Const. Art. IV § 9, Pa. Stat. 71 § 299 (1996) ;Tex. Const. Art. IV § 11, Tex. Code Crim. Proc. Ann. Art. 48.01 (1997).

F. States specifically providing for inmate interview by statute, code or rule.

Ariz. Comp. Admin. R. & Regs. R5-4-602(C)(4) (1996); Florida Rules of Executive Clemency (1997); Iowa Code §914.5(2); Mich. Const. Art. V § 14, Mich. Stat. Ann. § 28.2313, 28.314 (1996); Ohio Death Penalty Clemency Procedure, Sect. VI(C)(2) (1994); Penn Stat. 71 § 299, 37 PA. Code § 81.282 (1996) (capital inmates only); S.D. Admin. Rules 17:60:05:01 (1997); Tenn. Bd. Of Paroles Rule 1100-1-1-.15; Utah Code Ann §77-27-7 (1996).